The Metallic Lathers' Union of New York and Vicinity Local 46 of the Wood, Wire and Metal Lathers' International Union *and* Mack C. Griffin, Pembroke Blyden, Earl Diggs, Linton Brown, Alexander Thompson, and John A. Cleary, and Building Contractors Association, Inc. and The Cement League, Parties to the Contract. Cases 2-CB-6021, 2-CB-6046, 2-CB-6868, 2-CB-6923, 2-CB-6841, 2-CB-6851, 2-CB-6859, and 2-CB-6900

March 4, 1982

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS FANNING AND ZIMMERMAN

On July 30, 1981, Administrative Law Judge Michael O. Miller issued the attached Decision in this proceeding. Thereafter, Respondent and the General Counsel filed exceptions and supporting briefs. Respondent also filed a brief in opposition to the General Counsel's exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge as modified herein.

The complaint alleges that Respondent violated Section 8(b)(1)(A) and (2) of the Act by discriminating against nonmembers of Local 46 in the operation of its exclusive hiring hall. The Administrative Law Judge found that, with the exception of referrals for the position of job steward, Respondent did not refer its members to work in preference to nonmember registrants. In finding that Respondent unlawfully refused to refer journeymen members of other locals as stewards, the Administrative Law Judge observed that experienced nonmember journeymen appeared to meet the Union's criteria for steward, and Respondent's total exclusion of these workmen from steward referrals could only be explained by a discriminatory preference for its members. The Administrative Law Judge noted that the steward referrals issue was closely related to the complaint's allegations and was fully litigated.

Contrary to the Administrative Law Judge, we find that the General Counsel failed to put the steward referrals question in issue at the hearing and that Respondent was thereby denied the opportunity to litigate the matter fully and to present evidence justifying its conduct. Respondent's steward referrals were not specifically mentioned in the complaint nor were they discussed by the General Counsel in his case-in-chief. Respondent did not receive notice of this theory until the General Counsel submitted its post-hearing brief. Had Respondent been aware that the matter was in issue, it alleges it would have sought to introduce evidence at the hearing to show that the journeymen members of other locals were not qualified to perform the work required of a job steward. Since it was not clear that steward referrals were in issue and Respondent did not have the opportunity to present a defense, we find that the issue was not sufficiently litigated. Accordingly, we will not adopt this finding of the Administrative Law Judge and shall dismiss the complaint in its entirety.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

DECISION

STATEMENT OF THE CASE

MICHAEL O. MILLER, Administrative Law Judge: These consolidated cases were heard in New York, New York, on October 31, 1978, September 17, 18, and 22, 1980, December 15-17, 1980, and January 22, 1981, based on unfair labor practice charges filed by various individuals in 1975 and 1977[1] and on an order consolidating cases, consolidated complaint and notice of hearing issued by the Regional Director for Region 2 of the National Labor Relations Board, herein called the Board, on January 23, 1978, as thereafter amended. The amended complaint alleges that the Metallic Lathers' Union of New York and Vicinity Local 46 of the Wood, Wire and Metal Lathers' International Union, herein called Local 46, Respondent, or the Union, violated Section 8(b)(1)(A) and (2) of the National Labor Relations Act, as amended, herein called the Act, by unlawfully discriminating against those who were not members of Local 46 in referrals to employment from its hiring hall. Respondent's timely filed answer denies the commission of any unfair labor practices.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, and to argue orally. Briefs, which have been carefully considered,[2] were filed by the General Counsel and Respondent.

[1] Case 2-CB-6021 was filed by Mack C. Griffin on September 16, 1975; Cases 2-CB-6046, 2-CB-6868, and 2-CB-6923 were filed by Pembroke Blyden on October 20, 1975, August 29, 1977, and October 3, 1977, respectively; Case 2-CB-6841 was filed by Earl Diggs on August 11, 1977; Case 2-CB-6851 was filed on August 18, 1977, by Linton Brown; Case 2-CB-6859 was filed by Alexander Thompson on August 23, 1977; and Case 2-CB-6900 was filed by John A. Cleary on September 16, 1977.

[2] Respondent's motion to strike portions of the General Counsel's brief, is, except as otherwise indicated herein, denied. That motion was essentially a reply brief for which there is no provision in the Board's Rules and Regulations (see Sec. 102.42 thereof).

Upon the entire record, including my careful observation of the witnesses and their demeanor, I make the following:

FINDINGS OF FACT

I. THE UNION'S LABOR ORGANIZATION STATUS AND JURISDICTION—CONCLUSIONS OF LAW

The complaint alleges, Respondent's answer admits, and I find and conclude that the Union is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

At all times material herein, Respondent has been party to a series of collective-bargaining agreements with the Building Contractors Association, Inc., herein called BCA, and The Cement League, herein called The League. Both BCA and The League are associations of employers in the building and construction industry. BCA and The League exist, *inter alia*, for the purpose of representing their employer-members in collective bargaining and administering collective-bargaining agreements with various labor organizations, including Respondent.

Dic Concrete Corporation, a New York corporation, is a concrete subcontractor, involved in constructing residential, commercial, industrial, and office facilities. It maintains its principal office in Hicksville, New York. Annually, Dic derives gross revenue in excess of $500,000 from these operations, and annually purchases goods and supplies, valued in excess of $50,000, directly from points outside of the State of New York, for use in its New York operations. Dic has been a constituent member of The League at all material times.

John T. Brady and Co., Inc., herein called Brady, a New York corporation with its principal office in New Rochelle, New York, and places of business elsewhere in the State of New York, is a general contractor in the building and construction industry, constructing industrial, commercial, and office facilities. At all times material herein, Brady has been a constituent member of BCA.

The complaint alleges, the record establishes, the Union has stipulated, and I find and conclude that BCA, The League, Dic, and Brady are now, and have been at all times material herein, employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Issues and Principal Contentions of the Parties*

The Union operates a hiring hall for the referral of workmen in the lathing and structural steel reinforcing trades. The General Counsel contends that Respondent has violated Section 8(b)(1)(A) and (2) of the Act by discriminatorily giving preference in referrals to employment to its members, referred to generally as journeymen or bookmen, and by denying referrals to nonmembers (including those who are members of other local unions), called permitmen. This discrimination, it was alleged, occurred through the Union's failing to accord the nonmembers the requisite priority for referrals and by its permitting members to circumvent the hiring hall rules by obtaining jobs with contractors without registering at the union hall (direct hires) or by returning to work for a contractor after a layoff in excess of 1 day (callbacks), all to the detriment of the permitmen.

Respondent denies that its referrals were discriminatory and contends that the General Counsel both misunderstood the priority system and failed to appreciate the distinctions in the various kinds of work done by employees referred from the Union's hall. In regard to callbacks and direct hires, Respondent acknowledges that individual employees sometimes secured their own employment and sometimes returned to a jobsite after a hiatus of more than 1 day. It denies, however, that the Union was in any position to effectively prevent such actions, that such actions necessarily favored members, or that the return of employees to earlier held employment necessarily involved layoffs such as would render their reemployment impermissible under the hiring hall rules.

The General Counsel's case rests largely on conclusions to be drawn from the computerized record of the activities of the hiring hall from 1975 through 1979, the so-called activity reports. Respondent contends that these activity reports are incomplete and inaccurate.

B. *Respondent's Motions To Dismiss*

Several times during the course of the hearing, and again on brief, Respondent moved for dismissal, contending that the General Counsel's delay in prosecuting this case required that the doctrine of laches be applied.[3] My rulings at the various stages of the hearing, denying said motions, are adhered to herein. The unfortunate delay in prosecuting these cases[4] is not, as the Supreme Court has held, sufficient reason for depriving employees of their statutory rights. *N.L.R.B.* v. *J. H. Rutter-Rex Manufacturing Company, Inc.*, 396 U.S. 258 (1969); *Woodlawn Hospital*, 233 NLRB 782, 795 (1977). I have, however,

[3] Respondent also argued that dismissal was mandated by Sec. 706(1) of the Administrative Procedures Act, 5 U.S.C.706(1). That section, applicable to reviewing courts, permitting such courts to "compel agency action unlawfully withheld or unreasonably delayed," is not applicable here.

[4] The prehearing delay was inordinately long only in regard to the charges filed by Griffin and Blyden in September and October 1975. As to these, the General Counsel has asked, on brief, that I take official notice of a December 8, 1975, letter from the Regional Director for Region 2 of the National Labor Relations Board, first brought to my attention as an attachment to the General Counsel's brief, purporting to defer consideration of Case 2-CB-6046, Blyden's original charge, pending possible contempt action and/or corrective action by the administrator of the hiring hall. Respondent moved to strike all references to this letter. The General Counsel did not offer it in evidence or move to reopen the record for its receipt; neither did he explain why this letter, allegedly contained within the Region's case file, could not have been adduced during the extended hearing. Respondent, therefore, had no opportunity for *voir dire* or cross-examination with regard to this letter. Respondent could not show, for example, when the alleged period of deferral ended or whether the deferral also applied to Griffin's charge, Case 2-CB-6021. Accordingly, I must conclude that official notice of such a document would not be proper. See *Seafarers International Union of North America, Pacific District, AFL-CIO, and its affiliates (American Pacific Container Lines, Inc. (AMPAC))*, 252 NLRB 736 (1980).

It is not possible, on this record, to assess responsibility for the unfortunate additional delay of nearly 2 years, from the time the hearing opened in September 1978 until it resumed in September 1980, while settlement proposals were pending before the General Counsel in Washington, D.C.

considered the effect of those delays upon the availability and reliability of the evidence adduced by all parties.

Respondent additionally moved for the dismissal of the complaint, as amended, contending that the General Counsel's misunderstanding of the manner in which the hiring hall rules operated and the lack of specificity in the complaint denied it due process of law. The General Counsel did misapprehend how the referral system operated and that misapprehension caused the General Counsel to misplead certain aspects of the alleged discrimination. However, in view of my evaluation of the General Counsel's evidence and my disposition, on the merits, of the issues raised herein, I need not reach the due process question.

C. *The Union, Its Work, and Geographical Jurisdictions*

Local 46 represents employees in two distinct crafts, referred to by all parties as inside and outside work. Inside work is the work of lathers and involves the installation of tin, wood lath, plaster partitions, and various kinds of ceilings and the construction of arches. It is a skilled trade, generally requiring the completion of an apprenticeship in order to acquire journeymen status. Outside work is the laying out or preparation of reinforcing structural steel preliminary to the pouring of concrete for slabs, beams, and columns. Within the outside work are various skills, both general and specific. The specific skills, which require training or experience, include welding, tag writing, and machine operating.

The Union's geographical jurisdiction includes the five boroughs of New York, Nassau and Suffolk Counties (Long Island), Westchester County, and portions of Rockland County. In certain directions, the Union's jurisdiction extends considerably more than 100 miles from its Manhattan office and hiring hall.

Notwithstanding the Union's extensive work and geographical jurisdiction, technological changes, a long recession in the construction industry, and the assumption of jurisdiction by other trades had steadily reduced the number of employees seeking work under Local 46 contracts. Thus, while there were approximately 3,500 such employees in 1973, this number decreased to about 2,700 in 1974; 1,600 in 1975; 1,000 in 1976; and 800 between 1977 and 1979.

During the relevant periods herein, Local 46 has had collective-bargaining agreements with a number of employer associations. Included are BCA, The Building Trades Employers of New York, The League, The General Contractors Association of New York, The Nassau-Suffolk Contractors Association, The Concrete Contractors Association of Nassau and Suffolk, The Building Trades Employers of Westchester and Putnam Counties, and The Lathing and Furring Contractors Association. The General Contractors Association of New York consists of heavy contractors, those building bridges, tunnels, and heavy foundations. The League members are contractors engaged in the concrete and steel work involved in highrise construction. The Union provides outside workers to these employers. The employers who are members of the Metal Furring and Lathing Association perform inside work. Within each of the associations there are contractors who may employ from 1 to more than 100 workers from Local 46 at a time. The Union also has contracts with several hundred independent contractors who are not members of any of the associations.

D. *The Hiring Hall Rules*

1. Origin

In May 1968 the United States Government commenced an action against the Union and others under Title VII of the Civil Rights Act of 1964, 42 U.S.C.2000e, charging that the defendants had denied minorities equal opportunities with respect to apprenticeships and employment. In February 1970, a consent decree was entered into and approved by United States District Judge Marvin E. Frankel, which included an agreement to establish rules and procedures for the operation of the Union's hiring hall. The agreement recognized the Union's bifurcated work and extensive geographical jurisdiction and provided for equal employment opportunities for all who registered "on the open employment list." In doing so, it stated:

> All workmen shall be treated on a nondiscriminatory basis and without any preference on account of union membership or on account of time worked under a collective bargaining agreement, *except that experience in the trade may be used as basis for preference if it relates to the ability of the workmen to perform the work required.* [Emphasis supplied.]

The agreement defined "work permit" as the registration card for *outside work.*

The agreement provided for an administrator to oversee and review the functioning of the hiring hall. In July 1971, Judge Frankel signed a memorandum confirming the hiring hall rules and procedures as prepared by the administrator, George Moskowitz, following consultations and hearings with the parties. Those rules became effective on August 17, 1971.

2. Provisions

To the extent relevant here, the hiring hall rules and procedures require the following: the establishment of a master eligibility list containing the name, social security number, and status (journeyman of Local 46, journeyman of another local, permitman, or apprentice) together with an indication of the outside work experience claimed by any workman seeking specific experience referrals; the maintenance of a daily register of workmen seeking referral to employment in New York City; and a record, referred to as the contractors' sheets, consecutively numbered, of employers' requests for the referral of workmen, showing the date and time of the request, each contractor's name and location of the jobsite, the number and category (foreman, shop steward, or insider lathers) of workmen requested, whether any specific outside experience was required and its nature, and whether a car was required.

The Union was called upon to submit plans or programs to the administrator for training courses for all

registrants interested in acquiring training and experience for specific experience outside work. The courses were to be publicized to all journeymen and permitmen and were to be held as frequently as the administrator deemed appropriate. Those completing such training programs were then entitled to have their eligibility for specific experience referrals entered on to the master eligibility list.

Workmen seeking New York City jobs register at the hall. Workmen seeking referrals to suburban jobsites are permitted to register either at the hall, indicating their availability for such work, or by telephone. The business agents are required to offer jobs in the order in which the requests were received, to announce each job to all registrants, to make referrals to jobsites in New York City to those registrants present in the hall who had acquired priority for such referrals (as hereafter defined), and to refer workmen to suburban jobsites first by reference to the priority lists and then, if the requests could not be filled from those with priority, by alternating between those who had registered at the hall for such referrals (i.e., car available) and those who had called in seeking such work.

The hiring hall rules preclude the Union from granting an employer's request to refer any specific individual other than as a foreman. The Union is, however, specifically permitted to fill requests for minority group workmen. In regard to transfers and the recall of workmen to a jobsite, the rules provide:

> VI. TRANSFERS
>
> A. Employers are permitted to transfer workmen from jobsite to jobsite without the men registering in the Hiring Hall as long as there is no break in the continuity of the employment of such 25 men. *If any workman is laid off by an employer for more than one day, he is required to register for referral at the Union Hiring Hall in order to obtain further employment.* [Emphasis supplied.]

Priority for job referrals was acquired and recorded as follows:

> 1. The Union . . . shall be required to maintain an accumulative list for the previous two weeks of all workmen who registered at the hiring hall . . . recording the dates on which each workmen did not obtain employment.
>
> 2. Workmen whose names appear on such list more than 5 times in said (2) week period shall be entitled to priority for referral. The priority sequence shall be established by the number of days when the workmen was not referred for employment . . .

The administrator is empowered to require that such records as he may need to review the operations of the hall be maintained and he is responsible for making a computer study of the Union's records on a periodic basis. Based on the administrator's analysis of that study and such other information as he might receive, he has the "power to amend, modify, revise or change these rules of procedures, or any of the forms . . ." subject to review by the U.S. District Court at the request of either party. As discussed, *infra*, the priority rules were changed in September 1976.

The employers with whom Local 46 has collective-bargaining agreements were not parties to the Title VII action, the consent decree and agreement, or the rules and procedures for the operation of the hiring hall. However, the contracts between the Union and both BCA and The League during all relevant times provide, *inter alia*:

> (1) The Union shall establish and maintain an open employment list for the employment of competent workmen in accordance with the Rules and Procedures For Operation of Hiring Hall dated August 18, 1971 and presently in effect and referrals shall be made pursuant to said Rules and Procedures.
>
> * * * * *
>
> (5) The hiring hall shall be the exclusive source of workmen and no hiring shall be done at the jobsite.

The record does not establish whether these hiring hall rules and procedures are similarly referred to in Respondent's other collective-bargaining agreements. It suggests that the Union has exclusive hiring hall provisions in each of its collective-bargaining agreements.

3. Recordkeeping

As noted, the administrator is required to make a periodic computer study of the activities of the hiring hall. That study, the activity report, is drawn from three documents, the daily sign-in sheets, the contractors' sheets or requests, and the weekly reports from each of the job stewards which purport to identify every individual working on the job during that week, their hours, and their wages. Of these, only the activity reports and contractors' sheets were offered and received in evidence.

The activity reports purport to show the name, social security number, membership status (journeyman of Local 46, journeyman of another local, permitman, apprentice, or trainee), minority status, all of the dates on which the individual registered at the hall for referral, all referrals, whether the referral required specific skills and/or a car, all referrals as steward or foreman, and all employment with and earnings from the contractors who are party to agreements with Local 46.

The General Counsel places substantial reliance on the activity reports to establish the violations alleged in the complaint. Respondent objected to their receipt in evidence and argues that they are neither the best evidence of the referrals nor sufficiently detailed or accurate to warrant the kind of reliance the General Counsel would have placed on them. These records, I find, were appropriately received in evidence as compilations of data made at a time proximate to the events described therein, from information properly transmitted by persons with knowledge of those events, which were kept as a regular practice in the course of a regularly conducted business activity. (See Fed. R. Evid. Rule 803(6)). It is a common practice in today's business world for records such as

these to be kept with the aid of a computer. Properly authenticated, and their accuracy (or the limits thereto) established, they have the potential for greatly assisting the factfinder.

First, in utilizing a computerized record, however, the computer maxim of "GIGO" must be considered: "Garbage in, garbage out." The report which the computer produces is only as reliable as the information which is placed in it. Respondent correctly asserts that these activity reports do not warrant wholehearted reliance on them for a number of reasons. First, the master eligibility list, which provides the activity reports' information as to the status of each registrant, was prepared in the early 1970's. It has not been updated for some years. Therefore, individuals shown in the report as Local 46 journeymen-members may not have been members as of the date of their referral. Or, those shown as permitmen, i.e., nonmembers, may have acquired journeyman status by the time of a reported referral. For example, Linton Brown, one of the Charging Parties (who is incorrectly listed in the activity reports as B. Linton), acquired journeyman status in 1979; the 1979 activity report does not reflect that change in status. Ignacia Guerrero similarly became a journeyman in about 1978; his change in status is not reflected in either the 1978 or 1979 activity reports.

Second, while the computerized record lists all of the days on which each individual registered for referral, it does not indicate the order of signing in. This is significant inasmuch as the referrals, after September 1, 1976, were made according to the order of daily registration.

Third, the computerized record does not indicate the possession of special qualifications, such as specific inside and outside skills or the availability of a car, which the registrants were supposed to record when they registered.

Fourth, the activity reports frequently fail to show when a referral was to a suburban jobsite. That fact would normally be established by a check mark on the contractor's sheet under "Car Req'd" and transferred from there to the activity reports. Often, however (and almost universally after mid-1977), the business agents did not check the car required box; the fact that it was a suburban referral can be noted on the request only from the fact that no workman signed out or from the description of the location. In such cases, the computerized record does not pick up the suburban nature of the referral.

Fifth, business agents sometimes write out the nature of specific outside skills requested but check only the general experience box. When that happens, the referral sometimes appears in the activity report to be one requiring only general outside experience. For example, contractor's sheet 27013 (November 14, 1975) was checked as requiring only a generally experienced outside worker but the work was described as "machine," a specific experience job. The 1975 activity report, A. Hampton, page 473, does not show this to be a referral requiring specific experience. See also contractor's sheet 27565, August 5, 1976, and the 1976 activity report, pages 136 (O'Neill) and 294 (Dennis).

Sixth, the failure of a steward to transmit, or the Union to receive, a steward's report creates a misleading gap in the activity report, making it appear as if an individual were referred to a job but received no earnings or was laid off by an employer for some period of time and was then called back. Union Business Manager Maher testified that stewards' reports are received from most of the jobsites. Administrator Moskowitz opined that, while there were instances when the reports were not filed or were untimely filed, there has been a legitimate effort made to complete and maintain these records. He pointed out, however, that the stewards are workmen, not necessarily educated, and their reports are sometimes incomplete or illegible. Moreover, not all of the jobsites employing workmen from Local 46 have a Local 46 job steward. None is assigned on the smaller jobs, generally those involving three or less men. The record does not explain how, if at all, the stewards' reports would be completed, or the information otherwise transmitted, on such jobs.

I have concluded that, from an examination of the activity reports, there have been numerous instances when no steward's report was received. Where, for example, a workman who has consistently registered at the hall while he was unemployed receives a referral and then ceases to register for some days or weeks, the inference is warranted that he secured employment from the referral and actually worked, notwithstanding that the activity report shows no earnings for him during the period of nonregistration. See, for example, the referral of C. Campbell on November 5, 1975 (contractor's sheet 26978, misdated as October 5, 1978, and the 1975 activity report, p. 582); the referral of F. Mennie on November 7, 1975 (contractor's sheet 26992, 1975 activity report, p. 465); the referral E. Donoghue on March 30, 1976 (1976 activity report, p. 89); the referral of L. Capria on March 18, 1977 (1977 activity report, p. 8); and the referral of L. Green on April 21, 1978 (1978 activity report, p. 56). That conclusion is also warranted from the large number of referrals each year for which there were no reported earnings. According to the activity report summaries submitted as argument by the General Counsel, there were no earnings reported for 490 of 923 assignments (i.e., individuals referred) in the last three quarters of 1976. In 1977, there were 663 assignments out of 1,970 for which no earnings were reported. In 1978, no earnings were reported for 762 out of 1,969 assignments. And, in 1979, no earnings were reported for 863 of 2,529 assignments. Logic would dictate that the Union would not be making, and the contractors would not be seeking, the referral of so many workmen if there were no work. The only viable explanation for this phenomenon is the unavailability of the stewards' reports.

Comparison of the contractors' sheets with the activity reports also reflects other errors or omissions in the reporting of the workmen's activities. The following are illustrative and not all-inclusive: D. Lynch, a journeyman, was referred to Civetta and Sons on July 2, 1976, according to contractor's sheet 27486. The 1976 activity report (p. 98) shows him commencing work for Civetta in the week ending July 13, 1976, but does not reflect

any referral. Similarly, O'Connor, a journeyman, was referred to Bildot Steel Corporation on August 6, 1976 (incorrectly written as 1975 on contractor's sheet 27571). He began working for Bildot in the week ending August 10, 1976, according to the activity report (p. 304), but no referral is shown. In some cases, either the workman's name or social security number is illegibly written on the contractor's sheets, preventing the transfer of information to the activity reports. See contractors' sheet 29188, a referral of E. DeSouter, which incorrectly reports DeSouter's social security number; as a result, the activity report does not pick up his referral on that date. In other cases, individuals clearly designated on the contractors' sheets by name and social security number are not listed in the activity reports. Examples of this include Munz, social security number 117-19-2884, referred on May 30, 1979, pursuant to contractor's sheet 30150, and B. Anderson, social security number 089-27-4416, referred on June 28, 1979, pursuant to contractor's sheet 30269.

E. *Qualifications of the Permitmen*

As previously noted, the hiring hall rules were established to provide job opportunities in outside work for individuals who were not members of the Union. In addition, they recognize that certain kinds of outside work require specific experience which the permitmen, generally, do not possess and they provide for the establishment of training programs to enable the permitmen to acquire that specific experience.

The General Counsel argues that the Union may not rely on the specific experience exception to explain the preponderance of referrals to its journeymen because it had failed in its obligation to provide training.[5] The General Counsel further argues that any reliance placed by Respondent on the specific experience requirements is "bogus and not supported by the record.

The General Counsel did not contend, in its pleadings, that the Union had breached any duty to provide training to the permitmen; moreover, no support for such a contention can be found in this record. The Union's business manager, Maher, testified without contradiction that the Union had an apprenticeship program for inside and outside workers until the early 1970's. It resumed that program in July 1980. Since the early 1970's the Union has participated in a training program, run by a board of urban affairs and the "New York Plan," which has trained permitmen for both inside and outside work. The Union's role in that training is minimal, only approving the program. The plan selects the individuals for training, they are trained at the jobsites by journeymen, and they are certified as ready for journeyman status by the plan. The Union does not question the plan's certification of any permitman to be a journeyman. Maher testified that the Union's original obligation had been to train about 90 workmen. Between 1975 and 1980, approximately 70 individuals completed the training program;[6] others dropped out before completion. Additionally, the activity reports identify a number of trainees and apprentices who were securing work through the Union's referral system.

According to the hiring hall rules, individuals claiming specific experience and seeking referral to specific experience jobs were supposed to so indicate on the daily sign-in lists. The few examples of those lists which are in evidence do not establish that permitmen either had or claimed to have the requisite experience. Neither was there any other evidence that any significant number of permitmen had the skills necessary for the specific experience referrals. There was no evidence offered or contention made that the business agents falsely designated contractor requests for generally experienced workmen as specific experience requests in order to circumvent the system.

Based on the foregoing, I must conclude that the evidence does not warrant a finding that the Union utilized the specific experience exceptions to the referral system as a subterfuge for the preference of members over nonmembers. The Union was obligated to refer workmen with the experience necessary to perform the work; where specific experience was requested they generally referred the member-journeymen.[7] All of the journeyman-members possessed specific experience as a condition of their journeyman status. I cannot find, on the basis of this record, that such referrals were improper.

Additionally, the hiring hall rules permit, and the contractor's sheets reveal, referrals out of order where a contractor has requested the referral of a minority group workman. There are minorities among the journeymen, the apprentices, and the permitmen.

F. *Evidence of Disposition To Discriminate*

The General Counsel introduced the following evidence, largely uncontradicted, to establish the Union's disposition to favor its own journeymen over permitmen.[8]

Ignacia Guerrero was a permitman from 1970 until 1978. He worked throughout 1975 and until the week ending April 27, 1976, for contractor H19, Horn-Sand-Slattery. When he was laid off around May 1976, Guerrero complained to Business Agent Eddie O'Conner. Unsatisfied with O'Conner's answer, he decided to wait and make his complaint to the administrator. On May 28, 1976, Guerrero was referred to contractor D13, Dic-Underhill, where he worked until sometime in the week ending July 6, 1976. He registered virtually every day thereafter and spoke to Moskowitz, in the hiring hall, during December, with O'Conner present. Guerrero complained that he was laid off to make room for the

[5] Some of what are referred to herein as permitmen are actually journeymen in other locals; presumably, they would not require training for specific experience outside jobs. The General Counsel treats them as permitmen in the complaint and brief and alleges that they were discriminated against like the permitmen who were members of no local. The General Counsel's summaries of the annual activity reports indicates that only about 3 to 10 percent of the registrants were journeymen from other locals. The number and percentage of such journeymen seeking work through Local 46's hall declined steadily from 1976 through 1979.

[6] For example, T. Christopher, I. Guerrero, and Linton Brown became journeymen.

[7] The activity reports evidence the occasional referral of a permitman to a job requiring specific experience. For example, see the 1977 activity report, p. 119-R. St. Louis, p. 174-J. Elerue, and p. 266-C. Peguero.

[8] None of the following statements are alleged as independent acts of restraint and coercion in violation of Sec. 8(b)(1)(A) of the Act.

"foreman" and heard O'Conner tell Moskowitz that the employer only wanted machine men on the job. Guerrero branded this statement a lie, telling Moskowitz that "the machine men had been there for [a] long [time] and they only have one machine there." Moskowitz made a telephone call and promised Guerrero that he would be sent out the following day. He was, to a subway job. The activity report indicates that he worked from the week ending December 21, 1976, through the week ending May 3, 1977, for three contractors, Horn Construction Company, Hospital Building and Equipment, and Horn-Sand-Slattery, with only the one referral.

Guerrero claimed that, when he was laid off again around May or June 1977, he was sent to a job by Fightback, the organization which was largely responsible for securing referral rights for minority permitmen. While on this job, he alleges, a bookman questioned his presence and Business Agent Ray Lashette had him terminated. On the Monday following that termination, according to Guerrero, Lashette referred him to Dic-Underhill, for whom he worked for about 6 weeks. The 1977 activity report does not show any employment by Guerrero between his May layoff and the commencement of his employment by Dic-Underhill in the week ending June 21. Earnings are reported for the 7 weeks between June 21 and August 2, 1977, from Dic-Underhill, but there is no evidence of a referral.

Linton Brown was a permitman from 1970 until he became a journeyman-member of Local 46 in March 1979. In May or June 1977, after an extended period of unsuccessful registration, Brown complained to Business Agent Eddie O'Conner, stating that he had seen individuals secure referrals on their first visit in the hall. O'Conner told him that there were "only bookmen going out at the time."[9]

In May or June 1979, after Brown had become a union member, he allegedly was told by Business Agent Peter McGovern that the Union could get him jobs if he would do the Union a favor and drop the charge which he had pending with the National Labor Relations Board.[10]

Permitman John Cleary testified that, in late 1977, a lather foreman to whom he was related wanted to hire him for a job where that foreman was working. When Cleary asked Business Agent Lashette whether his referral had been requested, Lashette said that it had not. When he asked Lashette why he had received no referrals, Lashette allegedly stated that he (Lashette) had not sent a permitman to a job in a year and that he could not send Cleary "because cardmen are out of work." Cleary received no referrals subsequent to this conversation. He continued to register at the hall on an increasingly irregular basis through the end of 1977. He apparently did not register at all in 1978.

Joseph Cambria, a journeyman-member of Local 308 but a permitman within Local 46, testified that sometime between 1978 and 1980 he introduced himself to a union delegate named Maloney and asked why he was not being referred out when others were. Maloney asked whether he was a permitman and stated that union work had not picked up much. When Cambria said that he was a "union man," Maloney allegedly replied, "Well that's different, sit down and we will see what we can do for you." Following this, according to Cambria, he was sent out on a job that lasted a couple of weeks. The activity report for 1978 reflects that Cambria registered on only 6 days (during a 2-week period in November) and received no referrals. During 1979, he registered a total of 20 times during 20 weeks between March and November. He was referred to an inside job (lather) on July 24.[11]

Frank Giardana, a journeyman-member of Local 308, has been working out of Local 46 as a permitman for the last 30 years. Giardana testified that he overheard a conversation between Business Agent Johnny Ryan and a permitman named Steve McFadden in March or April 1977. Ryan had come out of the office and read off a list of about 25 names, to which no one responded. McFadden then approached Ryan and claimed to be on the preferred[12] list. Ryan told him, "This is a special preferred list."

Additionally, Giardana testified that when he asked Ryan to send him out to St. Louis for work during the spring of 1978, Ryan refused and told him that he would have to be a bookman in Local 46. Ryan allegedly explained that the Union had previously sent others who had then tried to force their way into the Ironworkers Local and, because of that, Local 46 would only send its own members out of town.

G. *The Union's Referrals*

Pursuant to the consent decree and the hiring hall rules, those who registered unsuccessfully for referral six or more times within a given 2-week period were to be placed on a priority list from which they were to be referred ahead of all registrants who had not earned such priority. Because of the large number of unreferred registrants achieving priority, and the relatively few jobs to which those individuals could be referred, the priority list system bogged down. Thus, in all of 1975 and through September 1976, referrals were still being made from the lists of priorities achieved in December 1974.

The Union began complaining to the administrator, as early as 1975, of the backup in the priority list system. According to Maher, this meant that individuals whose names were called were frequently not present in the hall, causing a delay in the referral process as more names were called, and the contractors were complaining about the late arrival of referred employees. In August or September 1976, Moskowitz authorized the

[9] The record reveals that O'Conner's alleged statement was, at best, an exaggeration. Permitmen were referred to work during 1977, including during May and June. See, for example, the employment and referrals of the following permitmen, as indicated in the 1977 activity reports: K. Linton—April (no referral), May, and August (no referral) (p. 126); B. Sowley—June and July (p. 17); T. Thomas—April (p. 21); J. Larrieux—June (p. 33); M. Bowery—July (p. 47); and R. Bedford—April (p. 82).

[10] This conversation was the subject of a separate unfair labor practice charge which was settled. In agreeing to that settlement, the Union did not admit that it had engaged in the conduct charged.

[11] Although the activity report does not show him registering again for referral thereafter until mid-September, no earnings are shown resulting from the July 24 referral.

[12] As discussed *infra*, no priority list was being used in 1977.

Union to cease using the priority lists. He directed them to make their referrals from the daily sign-in registers, basing referrals on the order in which registrants signed in and on their experience and qualifications. This change was announced to the employees in the hall and, subsequent to September 1976, the priority lists were no longer utilized in the referral procedure. The Union has, since that time, used the daily sign-in lists for referral purposes. The priorities which registrants had been achieving week by week after the beginning of January 1975 thus became meaningless.[13]

The General Counsel acknowleges that, because of the backlog in the priority lists, the fact that referrals through September 1976 were being made pursuant to lists developed prior to 1975, and the fact that there was no evidence to indicate who had priority on any given day, it could not establish that any particular referral was out of priority. The General Counsel argues, however, that the overwhelming numerical preference for journeymen over permitmen, as reflected by the activity reports, proves discrimination.

The activity reports show the following:[14]

1. During 1975, 711 permitmen (including journeymen-members from other locals) registered on an average of 38.5 times per man. There were only 380 referrals of permitmen, averaging 1 for every 72.4 registrations. By comparison, journeymen registered only about 8.3 times per man in that year but were referred out once for every 4.5 registrations.

2. In the second quarter of 1976[15] 271 permitmen registered 4,852 times, 17.9 times each. There were but 35 referrals, 1 for each 138.63 registrations; and 336 journeymen registered a total of 1,574 times, 4.68 times each. They were referred 304 times, approximately 1 referral for each 5.3 registrations. However, when referrals for shop stewards (46), lathers (inside work—64), and specific experience (119) are eliminated, it appears that the Local 46 journeymen received only 75 referrals to general experience outside work in that quarter. Additionally, the summary indicates that 96 of the referrals required a car; 93 went to Local 46 journeymen; 2 went to permitmen; and 1 went to an apprentice.

3. In the third quarter of 1976, 228 permitmen registered 3,188 times and were referred 37 times, 1 for every 86.16 registrations; and 332 journeymen registered 1,459 times. The journeymen received 313 referrals, approximately 1 for each 4.8 registrations. However, eliminating from the referrals all of those contractor requests for shop stewards, lathers, and specifically experienced workmen, there were but 70 referrals of journeymen to general experience jobs. Additionally, the great majority of the requests which required a car were filled by journeymen.

4. In the fourth quarter of 1976, 173 permitmen registered a total of 2,262 times. They were referred out only nine times. During that same period, 291 journeymen registered 1,584 times and they were referred out a total of 209 times. However, with the exclusion of the requests for inside workers, stewards, and specifically experienced workmen, the journeymen received only 40 referrals to general experience work.

5. In 1977, 603 Local 46 journeymen registered for referral 6,525 times. They were referred out 882 times. Of those, 576 were referrals for foremen positions (11), stewards (113), inside lathers (136), or required specific experience (326), leaving only 306 referrals to general experience outside work. Only 225 permitmen sought referral in 1977; however, they registered a total of 8,041 times during that year. The permitmen shared a total of 73 referrals, 12 of which required specific experience.

6. In 1978, 611 journeymen registered for referral 5,686 times and 564 of them shared 1,663 referrals. Of these, 201 called for stewards, 124 for inside lathers, and 600 for specific experience. There were 738 referrals of Local 46 journeymen to jobs requiring only general experience. In the same period of time, only 220 permitmen registered 4,551 times and 111 received shared 265 referrals, including 12 to specific experience jobs.

7. In 1979, 605 journeymen registered 5,013 times and 585 journeymen shared 2,111 referrals. Of these, 1,031 required foremen (6), stewards (170), inside lathers (233), or specific experience (612). In the same year, 195 permitmen registered 3,691 times and 115 shared 358 referrals, including 32 for inside lathing work and 8 requiring specific experience.

Local 46 introduced the last three priority lists which were used in the hiring hall prior to the termination of the priority list system about September 1, 1976, the lists for the weeks ending December 2, 9, and 16, 1974.[16] On each list are the names of all registrants who had acquired priority in the 2 weeks preceding the date of that list, including both journeymen and permitmen. The lists, however, do not delineate the skill and experience levels

[13] To the extent that the General Counsel's pleadings, and Appendixes A and D of the amended consolidated complaint allege priorities acquired on a biweekly basis but not honored in the following weeks, they reflect a misconception of what actually took place in the hiring hall and must be disregarded.

[14] The General Counsel drew the 1975 statistics from an affidavit allegedly filed by a U.S. attorney in January 1979 in support of a motion for civil contempt arising out of a Title 7 action. The statistics for 1976 through 1979 were drawn from computer printouts which, allegedly, had been attached to one of the activity reports, not otherwise identified. Neither the affidavit nor the computer printout summaries were ever offered in evidence before me. The 1976 through 1979 summaries were, however, appended to the General Counsel's brief. It is, therefore, arguable that these summaries and the statistics drawn from them are not properly before me. However, while Respondent filed a motion to strike a number of matters raised in the General Counsel's brief, no motion to strike these documents was filed. Accordingly, and having compared the summaries to the activity reports and found them to be essentially accurate, I accept them as part of the General Counsel's argument, but only to the extent that they are based on facts contained within the record.

[15] No summary for the first quarter of that year was provided and I have omitted that period from this discussion.

[16] These it appears were the only priority lists which the Union could find in its records. In view of the delays in the instant litigation, which impaired the Union's ability to retain and produce all necessary records, and the equal availability to all parties of those records which were in the possession of the administrator, no adverse inference is warranted from the Union's failure to come forward with additional examples of the priority lists or other hiring hall records. Compare *Pipeline Local Union No. 38, affiliated with the Laborers' International Union of North America, AFL-CIO (Hancock-Northwest, J.V.)*, 247 NLRB 1250 (1980), where the union failed to produce evidence which was in its *sole* possession.

of the registrants inasmuch as few of them had indicated their skills and experience when they had registered.

Referrals from the priority lists were only made to outside work, the inside work being excluded from the operation of the rules pursuant to the consent decree. When a contractor's request called for an inside worker or one with specific experience, according to Maher, the business agent would call out the job; if more than one person in the hall was capable of filling that request, recourse was then had to the priority list and/or the daily sign-in sheet to determine who was first in line for that assignment.

Examination of the priority lists in conjunction with the contractors' requests and the activity reports illustrates how the contractors' requests for generally experienced outside workers were filled. The Union began to make referrals from the December 2, 1974, priority list on October 21, 1975. On that date, the first contractor's sheet requested two individuals with specific machine experience. The second request called for a shop steward to do inside work. These three individuals were referred from the hall but not off the priority list. The next request was for two individuals of general experience to do outside work. The priority list indicates that five names were called. Three were not present in the hall, as indicated by zeros following their names. Two, R. Bauer and G. Martin, both permitmen, were present and were referred.

There were no contractors' requests for generally experienced outside men, other than for suburban jobs, between October 21 and 29, 1975. On October 30, 1975, four outside workers, including some minorities, were requested (contractor's sheet 26970). Two nonminority workers were sent off of the priority list, J. Dee, a journeyman, and C. Cohen, a permitman (member of another local). Two minorities, not on the priority list, were also sent. One was Pembroke Blyden, a permitman and one of the Charging Parties herein; the other's name is illegible.

The next five contractors' requests called for either specific experience or inside workers. Contractor's sheet 29976, dated November 4, 1975, sought two outside workers, one with general and one with specific experience. John Clearly, a permitman whose temporary absence from the hall on October 30 had caused him to be passed over on that day, received the referral. Cleary is one of the Charging Parties herein. The next request sought a minority workman with general experience. F. Coleman, who was not on the priority list, was referred. The activity report indicates that Coleman was a permitman (member of another local) but gives no indication that he belonged to a minority group. The same contractor, Horn Construction, requested two workers on November 5 (contractor's sheet 26978, misdated as October 5, 1975) for a job on Staten Island, New York.[17] Two minority group permitmen were sent, one of them from his appropriate place on the priority list. Four additional requests, contractors' sheets 26983 through 26986, received on November 5, 1975, called for the referral of six generally experienced outside workers. All were filled, in order, from the priority list; at least two of those referred were permitmen.

On November 6, according to contractor's sheet 26988, permitman J. Kennedy was referred to a job at Kennedy Airport. On November 7, a request was received for one specifically experienced and one generally experienced outside worker. The generally experienced worker referred was J. C. Larrieux, a permitman. Next referred was F. Mennie, a permitman on the priority list who had apparently refused a referral on November 5. All of these permitmen were drawn from their appropriate places on the priority list.

On November 10, 1975, the Union filled a request for three generally experienced outside workers. All were drawn from their appropriate places on the priority list and two were permitmen. A request calling for an experienced outside worker with a car was filled by C. Satter, a permitman who was on the priority list.[18] The next request for an outside worker was filled by E. Williamson, a permitman who was next on the priority list. Contractor's sheet 26999 is a request for two specifically experienced and one generally experienced outside worker. The generally experienced outside worker referred was permitman John Rademaker, who was next on the priority list.

On November 12, 1975, the Union received a request for six outside workers, four with general experience. All four of the latter were appropriately referred from the priority list; three of them were permitmen.

On November 14, 1975, four outside workers were referred. All were permitmen and all came off the appropriate places on the priority list. One was Pembroke Blyden. A call for one generally experienced worker, on November 18, was filled by N. Gordon, a permitman from the priority list. A request for two generally experienced workers on November 19 was filled by M. Jarulli and Ivory Vaughn. Both were drawn from their appropriate places on the priority list. The activity report shows Vaughn to be a journeyman but does not reflect any referral on or about November 19, 1975. There is no reference in the activity report to Jarulli.

Local 46's referrals from the list of those who had acquired priority as of December 16, 1974,[19] follows a similar pattern. The Union began calling names from that list on May 20, 1976. The first name was D. Conte. He was referred, but there is not entry in the activity report for him.

[17] Staten Island, though within the New York metropolitan area, was considered an undesirable referral because of the difficulty in getting there. It was generally treated as a suburban referral.

[18] Both contractor's sheet 29996 and the priority list so indicate. However, the activity report shows neither a referral nor earnings for Satter at this time.

[19] In the interest of achieving some degree of brevity, I have omitted any detailed discussion of the Union's referrals from the December 9, 1974, priority list. That list was in use between November 24, 1975, and May 20, 1976. Comparison of that list with both the contractors' sheets and the activity reports establishes that all requests for nonsuburban general experienced outside work received in that period were filled, in order, by permitmen (including journeymen from other locals) with priority. Additional permitmen were occasionally referred, without reference to the priority list, in response to requests for minority workers and, in one case, to a job on Staten Island where the request did not specifically seek a minority (C. Campbell, March 24, 1976).

On May 24, 1976, Respondent referred two permitmen, R. Sterling and T. Skehill. They had been missed when their names were called off the December 9, 1974, list and there is a notation on the contractor's sheet to that effect.

On May 28, 1976, the Union responded to a request for three generally experienced outside workers by referring Guerrero, Cotter, and Dyre, all permitmen. Cotter and Dyre, but not Guerrero, were the next available individuals on the priority list. (See discussion, II,F, *supra*.) On June 2, Respondent referred A. Coppola, a permitman (journeyman in Local 102), who had missed his call from the list on May 20, 1976. The next request for an outside worker was filled by K. Linton on June 4, 1976. Linton's name does not appear on the priority list; he was a minority group permitman. On June 9, 1976, the Union referred F. Graber, a journeyman from Local 244 who was next on the priority list. On the same day it also referred four other generally experienced workers, N. Gordon, D. Grote, J. Ferrick, and S. Guinta, along with three specifically experienced workers. All four of the generally experienced workers were permitmen. On June 10, the Union referred two more generally experienced individuals, S. McFadden and J. Mooney; both permitmen. McFadden's referral is established by the contractor's sheet and the activity report; the priority list would appear to indicate that he did not respond to the call of his name. Another permitman, M. Monaghan, appears from the priority list to have been referred on June 10, 1976. Neither the contractors' sheets nor the activity reports show any such referral.

On June 14, 1976, according to contractor's sheet 27450, J. Figueroa, a minority group journeyman, was referred to a general experience job. Figueroa's name does not appear on the priority list. On June 15, 1976, the Union filled a request for a generally experienced worker by referring W. Felton. Felton, who was not on the priority list, was a minority group journeyman.

No further referrals from the priority list were made until July 13, 1976. However, according to contractor's sheet 27485 and the 1976 activity report (p. 411), the Union apparently referred Walter Lee, a journeyman-member, to a job requiring only general experience on July 7, 1976. Lee's signature on the contractor's sheet would indicate that it was not a telephonic referral.

On July 7, according to contractor's sheet 27491, the Union also referred R. Regulus, a permitman (journeyman member of Local 7), to a general experience job. According to the priority list, Regulus had been appropriately referred on June 18; however, the activity report indicates the possibility that he received no earnings from the June 18 referral. There are no notations on the priority list to explain this second referral.[20]

On July 14, 1976, Pembroke Blyden was referred off the priority list. On July 20, A. DiPietto, a permitman (journeyman in another local), next on the priority list to be present in the hall, was referred. Similarly referred in order, on July 22, was R. Sterling and, on July 26, J. McKennan and D. Jessup, all permitmen.

On July 26, 1976, the Union referred four individuals to W. J. Barney, according to contractor's sheet 27538. J. Irwin, a permitman, was referred from the priority list to a general experience job. Sheehan, a journeyman, was referred for a specific experience position. Two other journeymen, R. Gogatz and W. Heushkel, were, according to the 1976 activity report (pp. 62 and 86, respectively), referred pursuant to that same contractor's request to general experience positions. Gogatz, it appears, had not registered at the hall at all prior to his referral; the activity report indicates that he registered on Friday, July 30, 1976. Similarly, Heushkel had not registered at the hall since April and appears to have registered on Monday, August 2, 1976, notwithstanding that he worked at the Barney jobsite in the week preceding and the week following that registration. Heushkel did not sign out on contractor's sheet 27538; his referral may have been telephonic.

A request for generally experienced outside workers was received on August 4, 1976, and was filled by the next two available registrants on the priority list, both permitmen.

On August 11, 1976, according to contractor's sheet 27580, the Union had a request for two minorities. Three individuals were referred, one nonminority permitman from the priority list and a journeyman and a permitman, both minorities, who were not on the priority list.

On August 16, 1976, the Union referred four outside workers to Costello Concrete Construction Co. Three, a minority permitman, a nonminority permitman, and J. Tucker, who is not listed in the activity report, were referred from the priority list. A fourth, a minority permitman, was referred without having been on the priority list.

On August 31, 1976, the Union completed the December 16, 1976, priority list with the referral of three individuals off that list to general experience jobs. At least two, R. Mohamed and D. Thomas, were permitmen. The third, M. Jarulli, was not listed in any of the activity reports.

After August 31, 1976, referrals were no longer made from the priority lists. The administrator authorized the Union to make its referrals directly from the daily sign-in sheet. The record contains only a few examples of the daily sign-in registers for the period following the discontinuance of the priority lists, those which the Union was able to locate among its records.[21] They are the lists for July 7 and 14, 1977, February 15, 1978, and April 7, 1978.

The Union received four requests for the referral of employees on July 7, 1977, as reflected by contractor's sheets 28638 through 28641. The first request sought six employees, with no indication of specific experience, to work at Kennedy Airport. Six individuals were sent out of the hall. The names of four appear on the July 7, 1977, sign-in list;[22] two, Holst and Dunlay, do not appear from that list to have signed in. However, while Dunlay's name could not be found on the sign-in list, the activity report, supposedly drawn from that list and from

[20] The contractor's sheet shows an incorrect social security number for Regulus; it is correctly set forth on the priority list.

[21] See fn. 16, *supra*.

[22] McGuinness, Walker, Felton, and Hughes.

other documents, indicates that he did sign in on that day. All of those referred to the Kennedy Airport jobsite were either journeymen or their status could not be determined because their names were missing from the activity report. The next request, contractor's sheet 28639, sought an inside worker for lath. B. Croake, a journeyman, was referred. His name and social security number do not appear on the July 7, 1977, list. The activity report reflects that he signed on Tuesday and Wednesday, July 5 and 6, 1977. Contractor's sheet 28640 called for the referral of four individuals, three with general experience and one with specific experience, to a nonsuburban job. All four of the referred employees were on the sign-in list and the three who were referred to the general experience positions were all permitmen.[23] The fourth request for that day, contractor's sheet 28641, called for the referral of two individuals for a suburban jobsite, Rockville Center (Nassau County). The two who were referred did not sign out and their names were not on the sign-in sheet. The only one who was identifiable by his social security number, McAleavey, was a journeyman who, according to the 1977 activity report (p. 309), was referred as a lather, a fact not registered on the contractor's sheet. The activity report fails to reflect that the referral was suburban.

The Union recorded five referral requests on July 14, 1977. The first, contractor's sheet 28649, sought two individuals with no specification as to experience. Referred were John Dorritie, who was the first, and R. Baumann, who was the 14th to have signed in on that day. Both were journeymen. The second request similarly did not specify any particular experience. It was filled by the referral of Harry James, the fourth person to sign in. James was a minority apprentice. The third request called for the referral of four generally experienced outside workers. Referred were Larry Capria, Pembroke Blyden, Mack Griffin, and John Hughes. They had signed in second, fifth, sixth, and seventh that morning. Griffin and Blyden are permitmen and both are Charging Parties herein. The fourth referral, contractor request 28652, called for two individuals to work in Long Island City (suburban). Two journeymen, Anderson and Faulkner, who had signed in 9th and 13th, respectively, were referred. Only one individual, Larry McCallum, had registered on July 14, 1977, that he had a car available. There is no explanation of why McCallum, a journeyman, who was third on that day's list, was not referred ahead of either Anderson or Faulkner. The final contractor's request of July 14, number 28653, called for three individuals and did not specify particular experience. The three who were referred, Johnson, Rogers, and Shea, all journeymen, were numbers 15th, 16th, and 17th on the day's sign-in list. Of 18 individuals who signed in on July 14, 1977, 12 were referred to employment. There is no evidence that anyone not on the sign-in list was referred. Of the six who were not referred, three were journeymen, two were permitmen, and the status of one, F. Puine, could not be determined because he was not recorded in the activity report.

[23] Wells, Threatt, and Powers.

Contractors' sheets 28983 and 28984 reflect the requests for the referral of workmen received by the Union on February 15, 1978. Only two workmen were requested, one with specific machine experience and the other as a lathing foreman. The two who were sent, both journeymen, were the first two signatories on the list for that day.

Two contractors' requests were received on April 7, 1978, the date of the last sign-in list in evidence. Contractor's request 29097 (missing from the exhibits but reflected in the activity report) resulted in the referral of E. Zavodsky, a journeyman, to a job requiring specific experience. Zavodsky was the first person to have signed in on April 7 (1978 activity report, p. 163). The second request, number 29098, called for a machine operator on a suburban jobsite. The referral to R. Degnan, a journeyman, was made telephonically. The record does not reflect why J. Hatcher, or T. F. Helmke, both journeymen, was passed over for the suburban referral notwithstanding that they had registered as having cars available. No others who had signed in on that day had so indicated.

Comparison of the April 7, 1978, sign-in list with the 1978 activity reports establishes that, other than Zavodsky, no one was referred from the hiring hall on that day. Of the first 15 to register on that date, all but 4 were journeymen; the 4th registrant was an apprentice (M. Deverelly), and the 7th, 9th, and 13th registrants (Blyden, Moton, and Duggins, respectively) were permitmen.

In addition to the statistical arguments, the General Counsel, on brief, points to several specific situations which he contends demonstrate the Union's discrimination against permitmen. The General Counsel cites the "four referrals for journeyman Christopher in 1975 despite the infrequent number of times that he signed in that year." The 1975 activity report (p. 225) reflects that after signing in four times in February and again on March 3, 1975, Christopher was referred to a job on that latter date. He worked 11 hours and earned $114.20. He registered four more times during March and twice in April and was referred again. However, according to the activity report, he received no earnings from that second referral. In this, the activity report appears to be accurate because he continued to register on the remaining 4 days of the week following his referral. He signed in, without securing any referrals, 15 more times in the remainder of April, May, and June. On August 22, after signing in once, he received a referral to the same contractor, at a different jobsite, as his last referral. He worked approximately 6 days. He then signed in six times before his next referral on October 2, 1975. The activity report contains no record of earnings from this referral. According to the activity report, Christopher was a member of a minority group. Additionally, his last two referrals in 1975 were to specific experience jobs. There is no evidence in the record regarding Christopher's standing on the priority lists which were in use at the time of his 1975 referrals.

The General Counsel points to the referrals to a Dic Concrete Corporation jobsite (contractor and job number D12038) during the latter part of 1976. Fifteen individ-

uals are listed as having been referred to that jobsite; 14 are journeymen. Assuming that the General Counsel's listing includes all of the individuals employed at that jobsite during this period of time (an assumption which may not be warranted from the inaccuracies noted in the activity report and from the difficulty of manually culling all of the referrals to a single jobsite from the 463 closely typed pages of computer printout which comprise the 1976 activity report), the following may be noted concerning those journeymen: Five (Early, Fitzpatrick, Brunicarde, York, and McHugh) were not referred. They were transferred there from other Dic jobsites. Three (Kennedy, Rundie, and Trusley) were referred on the basis of specific experience and a fourth (Harrington) was referred as steward. Two (Ryan and Finn) apparently were not referred at all but secured the job on their own. One (Morrissey) was referred after signing at the hall on virtually every day for 5 weeks; and another (Abdullah) was a minority. The General Counsel correctly states that many permitmen had registered in the Union's hall regularly during that period and presumably were available to work on this jobsite.

The General Counsel compared the referrals of permitman Ernest Moten with those of journeyman Jimmy Hatcher during 1976 and 1977. Both had worked throughout 1976 at a jobsite designated as P48002. The 1976 activity report (p. 439) shows no earnings for Hatcher at that site after the week ending December 7, 1976. Hatcher registered at the hiring hall nearly every day from the beginning of January until the week ending March 4, 1977. Then, according to the 1977 activity report (p. 294), he returned to jobsite P48002. No referral is shown. He worked there until the end of May 1977, registered for referral three times, and was referred to a specific experience job on June 13, 1977. He worked at that job, on and off, until late September 1977. He received no additional referrals in 1977, notwithstanding his fairly frequent registration. Moten registered at the hiring hall virtually every day in 1977 and received no referrals until mid-August of that year.

The General Counsel cites the jobsite to which Moten was referred in August 1977, another Dic job designated as D13160, as evidencing discrimination. According to the General Counsel, there were 36 individuals on this jobsite in July and August 1977, 31 journeymen, 4 permitmen, and 1 trainee. The activity report reflects that 12 of the journeymen (McEnna, Murray, McGinn, Gogatz, Wittech, Dillon, J. Pyne, R. Pyne, Skehill, O'Connor, Anderson, and J. Ryan) were referred on the basis of specific experience. W. Ryan was referred as the steward. Sixteen of the journeymen (Hicks, Baumann, Finn, Dorritie, Horan, King, Coyle, Daly, McGowan, Ward, O'Neill, Scanlon, Maine, Figueroa, Young, and Considine) were not referred at all; rather, they were transferred by Dic from other jobsites, as permitted by the hiring hall rules. Only two of the journeymen, McHare and O'Connell, were referred to the jobsite to occupy general experience jobs.[24]

The General Counsel also relies on a Horn Construction Company jobsite, H06002, which, he contends, was overwhelmingly staffed by journeymen while permitmen lanquished in the hall. The 1979 activity report allegedly (see the earlier expressed *caveat*) shows that there were 21 workmen on the jobsite, all but 2 of whom were journeymen. Seven of these (Brennan, Douglas, Scheld, Montelcove, Shannon, Crowly, and Griffin) were referred on the basis of specific experience. Six or seven others (Murtha, Lamb, Dorritie, Maloney, Hampton, Anderson, and Faulkner) apparently transferred to this site from another Horn site in either 1976 or 1977.[25] Additionally, two of the journeymen (Walker and Frazier) are minority group members. One of the remaining journeymen, Hohs, had unsuccessfully registered nearly every day between the beginning of the year and the start of his employment for Horn in mid-April 1977. He worked on this site for less than 2-1/2 weeks.

In like vein, the General Counsel cites the Dic-Underhill jobsite, D13161, where, according to his analysis the activity report, there were 35 individuals working, 28 journeymen, 6 permitmen, and 1 apprentice; the activity report reveals that 8 of the journeymen (Walsh, Fowler, Harrington, Ryan, McKiernan, Briney, K. Hayden, and O. Hayden) were referred to specific experience jobs. Nine of the journeymen (McKenna, Ness, Harris, King, Hohs, Richardson, Tarvers, Scanlon, and Carhart) were transferred by the employer from other jobsites. The record is unclear, but a 10th, Lancelot, may similarly have been transferred. One journeyman, Lawlor, was referred as the steward. Ten journeymen were referred to general experience jobs, as were four of the permitmen. Two permitmen (Elerue and Peguero) were referred to specific experience jobs.[26]

Finally, in this regard, the General Counsel alludes to a nonsuburban jobsite, M17007, on which, he contends, 17 individuals were employed during August and September 1977. Of these 17, 15 were journeymen, 1 was an apprentice, and only 1 was a permitman. Examination of the activity reports indicates the following: 8 of the journeymen (Duffy, Holland, Morton, Scott, Fitzpatrick, Filen, Devlin, and King) were referred to specific experience positions; one (Tiernan) was referred as the job ste-

[24] The General Counsel also pointed out that two of the permitmen, Moten and Rodriguez, only worked 21 hours at this jobsite following their referral. However, the General Counsel made no contention, and there is no evidence, of discriminatory assignment of permitmen to jobs of short duration. I note that journeyman J. Pyne, who was referred on the same day as both Moten and Rodriguez, August 17, 1977, similarly worked for only 21 hours.

[25] Faulkner worked for Horn through nearly all of 1976 (1976 activity report, p. 253). The 1977 activity report (p. 177) shows neither registrations nor employment for him from the beginning of 1977 until the week ending April 5, 1977, when he is shown as working at this same jobsite with no new referral.

[26] The General Counsel pointed out that, of the six permitmen referred to this job, four worked for less than 2 days and only two worked for more than 2 weeks (assuming the accuracy of the activity report). I note, however, that journeymen who were referred for general experience jobs or for whom there is no notation of specific experience in the activity report, five (McKenna, Vaughan, Murphy, Stetzer, and McMurray) apparently worked only 7 hours each. Two other journeymen referred to general experience jobs (Reddy and Morrissey) worked 35 or less hours. The two permitmen who received more than 2 weeks' employment (Elerue and Peguero) were the two referred to specific experience jobs. It appears from this very narrow sample that individuals referred to specific experience jobs may stand a better chance of securing sustained employment.

ward; two journeymen (Gallagher and Galvin) were not referred at all—they apparently secured their employment themselves; and one journeyman (Abdullah) was a minority. Two of the journeymen referred to general experience jobs (Ledwith and J. Callagher) had been signing in regularly prior to their referral, but the activity report does not reflect any registrations by journeyman Moore prior to this referral to a general experience position. Thus, of the five referrals on this site which did not appear to require specific outside experience, one was assigned to a minority journeyman, three were assigned to other journeymen, at least two of whom had been signing in regularly for some time prior to their referrals, and one was assigned to a permitman.

H. *Suburban, Steward, and Foreman Referrals*

As previously discussed, the hiring hall rules permit suburban referrals, i.e., those to jobsites outside the city of New York, to be made to workmen who telephone in their requests for such assignments as well as to workmen to register in the hall. The General Counsel contends that the preponderance of suburban referrals to members establishes discrimination in the referral process. Similarly, the General Counsel further argues that the foreman and steward categories were used to exclude permitmen from the referral process.

A random sampling[27] of those contractors' sheets which appear to request suburban referrals (either the car required box was checked or there was no employee's signature) in conjunction with the activity reports (to ascertain the status of the referred workman) supports the General Counsel's contention that most of the suburban referrals were received by members of Local 46. Thus, in a random sample of 50 ostensibly suburban referrals made during 1975, only 14 went to permitmen. However, at least 15 of the remaining 34 were referrals to inside work, required specific experience, or called for the referral of a steward. In 1976, only 2 of the randomly selected 50 referrals were received by permitmen; however, 25 of the referrals were to specific or excepted job categories. In a sampling of 52 1977 referrals, none went to permitmen and only 1 went to an apprentice. Eight of those referrals were to general experience jobs. Similarly, in the sampling of 53 suburban referrals in 1978, none were made to permitmen and only 1 was made to an apprentice. Thirty-six of those referrals, it would appear, were to general experience jobs. And, the sample of 1979 referrals yields a virtually identical result; of 57 referrals, including 42 for general experience jobs, 1 went to an apprentice and the remainder were assigned to journeymen.

In considering the foregoing statistical analysis, it must be noted that the record is devoid of any evidence that permitmen sought suburban referrals. The activity reports do not record whether, in signing in, an individual claimed to have a car available. The few sign-in registers in evidence do not show any permitmen specifically seeking suburban work.[28] No permitmen testified to having sought such referrals or to having made their availability for such referrals known in the hiring hall.

Analysis of the activity reports corroborates the General Counsel's assertion that referrals as stewards were received, almost exclusively, by journeymen-members of Local 46. Of approximately 800 such referrals between 1975 and 1979, less than 15 went to either permitmen or apprentices. Maher testified that the stewards were selected by the business agent responsible for a given territory, without reference to any priority list, on the basis of qualifications, experience, rapport with people on the job, self-confidence, knowledge of the work, ability to read blueprints, and knowledge of the Union's constitution and the collective-bargaining agreement.

Very few foreman referrals are reflected in either the activity reports or the summaries, less than 25 in all for the years in question. All appear to have been journeymen and, with only one or two exceptions, all were members of Local 46. Maher testified, without contradiction, that in almost every case the foremen were selected by the contractors, as authorized by the hiring hall rules. The Union rarely had the opportunity to designate a foreman.

I. *Callbacks and Direct Hires*

As described above, the hiring hall rules require that all requests for outside workers be filled by union referral and that all workmen "laid off by an employer for more than one day return to the hiring hall and register in order to obtain further employment. . . ." The General Counsel contends that the Union discriminated against permitmen by permitting "members, after a layoff in excess of one day, to return to work for the same contractor or at the same jobsite." The complaint further alleges discrimination by permitting "individuals to obtain jobs with contractors at the jobsite without registering at the Union's hall."

The Union, by statements of counsel at hearing, in its brief, and in the testimony of James Maher, its business manager, acknowledges that the applicability of these hiring hall rules and admits that the provision precluding callbacks "was really for ten years observed more by its breach than by its observance. . . ." In this regard, the Union pointed out that there was no agreement or understanding with the contractors as to when a temporary shutdown, for such things as a lack of supplies or adverse weather, was a layoff which would come within the terms of this rule. The Union also admits that some workmen secure their jobs directly, without referral. Maher testified that many of the contractors, particularly the smaller ones, seek to retain as steady a work force as possible, notwithstanding temporary interruptions in their employment. Maher was aware that such practices went

[27] Neither party analyzed the suburban referrals. In the absence of such an analysis, a random sample would appear to be the most appropriate vehicle to determine how, and to whom, these referrals were being made.

[28] The activity report summaries appended to the General Counsel's brief purport to state the number of "car available" registrations by both journeymen and permitmen. Such statistics, however, would have to be drawn from the sign-in registers. Since those registers are not in evidence and those statistics therefore cannot be reviewed for accuracy and challenged, consideration of those portions of the summaries would be improper. See *S. Freedman Electric, Inc.*, 256 NLRB 432 (1981).

on; he did not believe that he could burden a contractor to start with new employees when other employees who were familiar with the work had been employed by him for substantial periods of time.

Maher further testified that the Union had made efforts to discourage or prohibit the direct hiring or callback of employees by talking to the contractors and by holding discussions with and sending letters to its members. No examples of such letters were offered. Neither was there any testimony from members to corroborate that such discussions had been held. The Union did not utilize its internal procedures to stem the direct hiring or callbacks by either threatening or imposing internal union discipline.

Maher also testified that it was difficult for the Union to learn about the callbacks or direct hires at a time or in a manner when effective action could be taken. The steward's reports come into the Union's office in large numbers, frequently after a job has been completed. Moreover, they are not reviewed by the business agents; clerical employees code and forward them to the administrator for entry into the computerized record. The computerized activity reports are received by the Union 6 to 8 weeks after the end of each calendar quarter. They are not so current as to provide the Union with evidence of existing callback and direct hire situations, even if the Union were willing to take more direct action to prohibit such employment.

The General Counsel introduced compilations from the computerized record which purport to list all of the nonreferral hirings and callbacks of journeymen from 1975 through 1979. As reflected in those compilations, the activity reports contain many instances of what appear to be the direct hiring of journeymen by the contractors.[29] It would serve no useful purpose to reiterate them here. Most, but not all, are what the General Counsel represents them to be.[30]

That journeymen were hired directly is not disputed by the Union. However, examination of the activity reports establishes that permitmen also benefited from being hired directly. The following are a few examples of what appear to be direct hires of permitmen:

Name	*Week Ending*	*Activity Report Page*
1975		
R. Bauer	July 8	14
R. Keith	Feb. 11	40
P. Kendrick	Sep. 30	62
T. Archer	May 20 and Sep. 9	171, 172
1976		
J. Hyman	Jan. 27	30
B. Leahy	April 27	60
M. Larkin	Feb. 3	60
E. Leahy	April 6	67
R. Hunter	Oct. 5	123
1977		
P. Thomas	April 19	21
T. Mullin	May 17	118
G. Williamson June 14	124	
K. Linton	Aug. 16	126
Linton Brown	Aug. 9	127
I. Guerrero	June 21	236
1978		
S. Wright	Sep. 5	13
J. McGee	Dec. 5	29
G. Ball	April 18	162
R. Perrerira	June 4	204
P. Blyden	July 7, Nov. 21, and Dec. 5	207, 208
1979		
R. Archer	Oct. 2	4
J. Malone	Jan. 9	14
R. Fairfax	Oct. 16	20
G. Williamson July 3	139	
Linton Brown	May 25 and 29	142, 143

The situation in regard to the callback of workmen is similar. Thus, the General Counsel introduced compilations which list, essentially accurately, many instances where it appears from the activity report that a journeyman worked for a particular contractor, was then not employed and subsequently reappeared on that contractor's payroll with no new referral. From these, it would appear (assuming that the steward's reports were furnished for all of the jobs in question and further assuming no other errors affecting the accuracy and completeness of the activity reports) that the individuals involved were "called back" by their employers. The activity reports, however, similarly reflect that permitmen were called back. The following are some examples, by no means all inclusive, of such incidents:[31]

Name	*Week Ending*	*Activity Report Page*
1975		
L. Haley	Sep. 23–Oct. 7	28
T. Hess	July 1–Aug. 19	155
T. Kendrick	Mar. 18–Apr. 15	61
T. Kendrick	Oct. 7–21	62
I. Guerrero	May 20, Aug. 5, Sept. 2, Oct. 14 and Dec. 13	552 552

[29] In such cases, the activity report shows the start of employment but lists no number from a contractor's sheet.

[30] For example, the March 18, 1975, referrals of C. Tooley, J. Morrissey, and T. Maine (1975 activity report, pp. 2, 51, and 76, respectively) appear to be callbacks rather than direct hires, the employees having worked for those contractors previously. The March 18, 1975, referral of J. Jackson (1975 activity report, p. 615) was to contractor P72, Piazza & Co. However, he worked for contractor P73, Sal Piazza, commencing on that date. That would appear to be a legitimate referral, perhaps confused by an error in applying the contractor codes.

[31] In some of these cases, the individuals, in consecutive weeks of employment by the same employer, worked on only 1 or 2 days. It would appear from such a pattern that they had been "laid off" for more than 1 day and, arguably, should have returned to the hiring hall.

Name	*Week Ending*	*Activity Report Page*
1976		
C. Barnes	June 15-22	8
S. Shurina	Feb. 17-June 15	76
T. Warnock	July 20-August 3	95
T. Evans	Aug. 3-Aug. 24	106
P. Blyden	Aug. 17-Sept. 14	314
1977		
R. Duggins	June 14-July 5	43
S. Gill	Jan. 18-Feb. 1	73
F. Beran	Jan. 25-Feb. 8	74
R. Bedford	Sept. 27-Oct. 25	82
1978		
N. Narine	Aug. 1-Sept. 19	75
J. Bautista	June 27-July 11 and Aug. 8-22	85
K. Linton	Apr. 18-May 9	120
W. McGregor	Nov. 21-Dec. 5	206
1979		
S. Wright	Apr. 24-June 5	16
T. Evans	March 6-13, and 27	56
C. Blake	Sept. 11-25	141
W. Lanham	Jan. 9-Feb. 23	145
M. Miller	Oct. 30-Nov. 13	174

It would appear from the record that the journeymen benefited more frequently from direct hires and callbacks than did permitmen. However, because the activity reports draw their information as to specific experience qualifications from the contractor's requests, which do not exist in cases of direct hires and callbacks, they do not reflect which of the direct hire and callback employment opportunities required specific skills.

J. *Analysis and Conclusions*

The case which the General Counsel has presented rests principally on a statistical analysis of 5 years' worth of computer-produced activity reports to establish discriminatory preference for the Union's members in the operation of the hiring hall. Examined broadly, comparing only the member referrals against those received by nonmembers, the statistics would seem to support the General Counsel's contentions. Clearly, the journeymen-members of Local 46 received the lion's share of the referrals. Such a broad examination, however, is misleading.

In *Hazelwood School District* v. *United States*, 433 U.S. 299 (1977), a case involving alleged racial discrimination in the hiring of teachers, the Supreme Court stated at 308, fn. 13:

> When special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value.

Similarly, Administrative Law Judge Welles, in *International Association of Bridge, Structural and Ornamental Ironworkers, Local 483, AFL-CIO (Building Contractors Assocation of New Jersey)*, 248 NLRB 21, 28 (1980), stated, "statistics in a vacuum can often mislead." The General Counsel's comparison of member and nonmember referrals, without regard to the recognized exceptions to the priority referral system, I find, does in fact lead to fallacious conclusions and is of no probative value in determining whether or not the Union operated its hiring hall in a discriminatory manner. See *International Association of Bridge, Structural & Ornamental Ironworkers, Local 45 (Building Contractors Association of New Jersey)*, 235 NLRB 211 (1978). The consent decree, and the hiring hall rules which it approved, specifically excluded inside work (lathing) from the referral system. Additionally, the existence of different skills required for outside work and the fact that not all who sought outside work through the hall possessed those skills were recognized; the Union was required to participate in training programs so that those without the requisite specific skills could acquire them if they so desired and was permitted to make referrals to outside work according to the skills requested by the contractors and possessed by the workmen. One may not conclude from this record that the Union failed in its obligation to provide training to the nonmembers. Neither may one conclude that the Union's agents falsely labeled contractors' requests as requiring more than general experience in order to exclude permitmen from the referrals.

When the referrals of journeymen to excepted jobs (and to steward positions, discussed *infra*) are eliminated from the General Counsel's equations, the numbers cease to compel a finding of discrimination. In the years between 1975 and 1979, from one and one-half to three times as many journeymen-members were registering at the hall as permitmen (although they did not register as often per man). As a group, they received from two to five times as many referrals to general experience jobs as the permitmen. A substantial percentage of those apparently general experience referrals were to suburban jobs (discussed *infra*) and, considering the errors and omissions prevalent in the activity reports, some of the remainder were quite possibly to specific experience jobs which had been misidentified. These statistics, alone, will not support a finding of unlawful discrimination.

Analysis of referrals made from the few priority lists and sign-in registers which were in evidence, in light of the recognized exceptions, essentially contradicts the General Counsel's assertions of discrimination. In most instances, both were properly followed for all general experience nonsuburban jobs. The few exceptions to a strict chronological referral system which appear therein are as readily explainable by mistakes in the record keeping as by discrimination. Moreover, some of those apparent violations of strict chronological referral adversely impact upon journeymen as well as upon permitmen.

The General Counsel's several specific examples of alleged discrimination which were culled from the voluminous record contain little to substantiate the complaint. Thus, journeyman Christopher may have been referred four times during 1975. He was, however, a minority and, as such, referrals to him could be made out of order pursuant to the approved hiring hall rules. Moreover, two of his referrals were to specific experience jobs. The

jobsites to which the General Counsel points as being overwhelmingly staffed by journeymen similarly fail to prove discrimination in the referral process. Most of the journeymen working on those sites were referred to excepted positions or were permissibly transferred by their employers from other jobsites. Others secured their own employment. There was no evidence that the remainder, with few exceptions, did not have priority over permitmen on the sign-in lists. Again, there were not so many exceptions that, considering the errors in the records and the impossibility of the Union explaining away one or two of several thousand referrals years after they were made, a conclusion of discrimination would be warranted.

Contributing to the obvious fact that members secured more referrals than did nonmembers were the suburban referrals and the referrals to job steward positions. Most of the former and virtually all of the latter were filled by journeymen-members of Local 46. The General Counsel contends that the Union used these excepted categories to exclude the permitmen from the benefits of the referral system.

In regard to the suburban referrals, it must be noted that they, like the New York City referrals, include a substantial percentage (one-third to one-half of all referrals) which require skills not possessed or claimed by the permitmen. More significant, however, is the absence of any evidence in this record that would establish that the permitmen sought referrals to the suburban jobs. To conclude that they did, or that they would have accepted such work if it had been offered to them, requires not an inference based on established fact but either conjecture or reliance on information not properly before the trier of fact. Accordingly, I am compelled to conclude that the exclusion of permitmen from most of the suburban referrals, suspicious as it is, does not support the General Counsel's allegations of discrimination.

The Supreme Court and the Board have recognized the "well established tradition that a union is entitled to have its own members as stewards in order to promote 'the effective functioning of collective bargaining.'" *Aeronautical Industrial District Lodge 727* v. *Campbell*, 337 U.S. 521 (1949); *International Association of Bridge, Structural & Ornamental Ironworkers, Local 480, AFL-CIO (Building Contractors Association of New Jersey)*, 235 NLRB 1511, 1512 (1978). This does not mean, however, that any designation of a member as steward is free from inquiry. The key to determining whether the Union has violated the Act by referring only members as stewards is whether its actions are arbitrary, invidious, or irrelevant to legitimate union interests and thus a mask for discriminatory motivation. *Ashley, Hickham-Uhr Co.*, 210 NLRB 32, 33 (1974).

In this case, the Union was referring workmen to several hundred contractors at at least as many jobsites. A steward was normally appointed on each job which had more than about three workers. Therefore, one cannot conclude solely from the fact that the Union was referring as many as 200 stewards a year from its hall that it was falsely designating referrals as requiring a steward in order to circumvent the referral procedures.

Respondent described what it required of its stewards, essentially a high level of experience and knowledge of the work, knowledge of the Union's constitution and the collective-bargaining agreement, and the ability to meet and deal with people. There was no evidence that these criteria, which are clearly not arbitrary, invidious, or irrelevant in and of themselves, were not applied by the Union in selecting its stewards. As the permitmen (other than those who were journeymen from other locals) did not have the knowledge, skill, and experience in all phases of the work which the Union sought in its stewards, I cannot conclude that the refusal to refer any of them as stewards was discriminatory.

There remains, however, the refusal of the Union to appoint stewards from among the permitmen who were journeymen in other locals. These individuals accounted for about 10 percent of all those seeking referrals in 1975 and 1976, 5 percent in 1977, and about 3 percent in 1978 and 1979. They were between 4 and 25 percent of all the journeymen who sought referrals in those years. Moreover, they registered more often, in terms of their numbers, than did the journeymen members. They received not a single referral as steward. Yet, at least some of them had been members of sister locals for as long as 30 years (for example, Frank Giardina) and had been working out of Local 46 for nearly as many years. I cannot believe that none of these experienced journeymen met the Union's criteria for stewards. No explanation, save discrimination, exists for their total exclusion. Accordingly, I must conclude that by this exclusion, the Union has discriminated against the journeymen-members of other locals, in violation of Section 8(b)(1)(A) and (2) of the Act. *Ironworkers Local 480, supra.*[32]

The General Counsel contends that Respondent has breached the duty of fair representation it owes to all who seek employment through the referral system by failing to enforce the hiring hall rules upon workers who secure employment without union referral and upon contractors who call back employees or hire them directly. Assuming, *arguendo*, the validity of this contention as a legal theory, the facts developed in this record do not, I find, support the allegation. Both members and nonmembers, including some of the Charging Parties herein, benefited from direct hires and callbacks. There was no evidence that employers were encouraged by the Union to hire members directly or to call them back. The preponderance of callbacks and direct hires of members over nonmembers is as rationally explained on the basis of the members' specific inside and outside work skills and likelihood that they were better known to the employers because of their longer service in the industry as it is by any supposed preference for union members. See *Ironworkers Local 483, supra* (under sec. E). Moreover, the record is too open to the possibility of error, particularly error resulting from missing stewards' reports, to support the General Counsel's allegations. This is espe-

[32] This issue was not specifically pleaded in the General Counsel's complaint. However, the exclusion of permitmen from stewards positions was closely related to the pleaded issues and was fully litigated. Resolution of this issue is therefore required. *Monroe Feed Store*, 112 NLRB 1336 (1955).

cially pertinent to the callback allegations inasmuch as a missing steward's report would make it appear as if all of the employees on the jobsite had benefited from callbacks. Finally, in the absence of some evidence that any of the hundreds of employers who secured employees through the Union's hall, other than those who were members of BCA and The League, were bound to comply with the hiring hall rules, I cannot conclude that the Union could have effectively enforced those rules upon them had it chosen to do so.

In analyzing the record and the General Counsel's contentions, I have considered the testimony which was offered to establish the Union's alleged disposition to discriminate. Guerrero's testimony establishes only his own belief that he was removed from two jobs to make room for journeymen-members. It does not establish that that was what actually occurred. Further, his testimony regarding employment pursuant to Fightback's efforts is not corroborated by the activity report. If anything, his testimony lends credence to Respondent's arguments regarding the inaccuracy of these reports and/or to the conclusion that both journeymen and permitmen secured employment without a referral being issued or recorded.

Similarly, Cleary's testimony does not establish that any request for his referral was denied because he was a permitman. There was no evidence that any such request was made and, if one had been made, the Union would have been obligated by the hiring hall rules not to prefer him on the basis of it.

Certain statements by the business agents do tend to show some desire on their part to prefer members. Thus, Lashette's statement to Cleary and O'Connor's statement to Brown, to the effect that only bookmen were being referred, would so indicate. However, when considered in light of the record, it is clear that these statements do not accurately reflect what the business agents were actually doing in the hall. McGovern's statement to Brown, offering him referrals in return for dropping the unfair labor practice charge and Maloney's statement to Cambria, when Cambria responded that he was a "union man," to the effect that Maloney would see what he could do for Cambria, also provide some evidence of a willingness to circumvent the referral system when it is to a union member's advantage.[33] However, these "intention" statements are not, I find, either sufficiently numerous or persuasive, when viewed against 5 years' referral activity, to overcome either the valid explanations for the disparity in referrals between members and nonmembers or the evidence establishing the unreliability of the activity reports as proof of discrimination.

Accordingly, with the exception of the discrimination against permitmen members of other locals in the referral of stewards, I shall recommend that the complaint, as amended, be dismissed.

THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(b)(1)(A) and (2) of the Act, I shall recommend that it be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the purposes of the Act.

The complaint alleges generally that Respondent discriminated against those applicants for referral who were not its members. It does not identify the alleged discriminatees. The evidence, I have found, establishes that the Respondent discriminated against journeymen-members of its sister locals in the referral of workmen to job steward positions. It is appropriate that the persons so discriminated against be made whole for any loss of earnings they may have suffered by reason of this discriminatory referral practice. Since neither the identity of those harmed by this discriminatory practice nor the extent of the discrimination against them in terms of lost earnings can readily be determined from the records in evidence in this case, it is appropriate that such determination be left to the compliance stage of this proceeding. See, for example, *International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, Local 101 (Stearns-Roger Corporation)*, 206 NLRB 30 (1973). See also *International Association of Bridge, Structural and Ornamental Iron Workers, Local No. 433 (The Associated General Contractors of California, Inc.)*, 228 NLRB 1420 (1977).

Any backpay found to be due pursuant to this Order shall be computed in accordance with the formula set forth in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977).[34]

Respondent argues that "just as litigation expenses and attorney fees may be assessed against a respondent whose defense is frivolous, so too such fees and expenses should be assessed against the General Counsel when its actions are frivolous." Respondent contends that the General Counsel's delays and his misunderstanding of the application of the hiring hall rules establish that this litigation was frivolous. While I have recommended the dismissal of substantial portions of the General Counsel's complaint, and found that in fact the General Counsel did misapprehend various aspects of the hiring hall operations, I cannot find that its litigation herein was "frivolous." Moreover, there presently[35] exists no authority for such an award against a governmental agency. Accordingly, I must reject Respondent's request for counsel fees and cost.

Upon the basis of the above findings of fact and the entire record in this case, I make the following:

[33] Maloney's conversation with Cambria might also be understood in the context of the greater skills possessed by the journeymen. I note that Cambria was referred in 1979 as an inside lather. The statement that Giardina allegedly overheard, regarding an employee claiming to be on the "preferred list" and being told of the existence of a "special preferred list," is also ambiguous. Moreover, it would appear to be improbable that Ryan would have said this inasmuch as there was no priority list in use at that time. Similarly, it is difficult to understand Ryan's alleged refusal to send Giardina to work out of State on the basis of the Union's earlier experiences with individuals who had tried to force their way into the recipient local in order to get a book (i.e., membership). Giardina, in fact, had been a member of Local 308 for many years.

[34] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

[35] But see the Equal Access to Justice Act (Public Law 96-481), Title 2 of the Small Business Expansion Act of 1980, 94 Stat. 2321, effective October 1, 1981.

CONCLUSIONS OF LAW

1. By discriminating in the referral of workmen as job stewards against those applicants for referral who were journeymen-members of locals of the Wood, Wire and Metal Lathers' International Union other than Local 46 because they were not members of Respondent Local, Respondent has caused the employer-members of the Building Contractors Association, Inc., The Cement League, and other employers with whom it maintains exclusive referral agreements to discriminate against employees in violation of Section 8(a)(3) of the Act and has thereby engaged in unfair labor practices within the meaning of Section 8(b)(1)(A) and (2) of the Act.

2. Respondent has not violated the Act in any other manner as alleged in the complaint.

[Recommended Order omitted from publication.]